M E M O R A N D U M

TO: **[REDACTED]**

FROM: **Rebecca Feliciano**

DATE: **26 July 2022**

RE: ***[REDACTED]***
Complaint Analysis & Supporting Research

CAUSES OF ACTION

1. Breach of Contract

The Ohio version of UCC (R.C. 1302) governs Plaintiff and Defendants consumer transaction for the sale of goods – e.g., the Caster Box.

Under the UCC, every contract or duty within imposes an obligation of good faith in its performance and enforcement. This means that **a failure to perform, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract.** Unlike common law, the good faith obligation is not a separate, independent duty but rather functions as a parallel obligation to those existing within the contract.

Fundamentally, the parties' obligations and duties will be construed according to their status under the UCC. Because **Defendant is a merchant** and seller for purposes of 1302.01, they will be held to a **higher standard of care** than non-merchants.

According to the general obligations of the parties per 1302.14, "the obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." Relatedly, per 1302.01, **goods** or conduct including any part of a performance **are "conforming"** or conform to the contract **when they are in accordance with the obligations under the contract**.

In this case, the Defendant had a duty and obligation to deliver, to Plaintiff, a caster box in accordance with the agreed upon terms, both express and implied. Defendant breached by delivering a nonconforming good (e.g., a caster box with a width 4 inches less than agreed upon). Upon receipt of the non-conforming caster box, Plaintiff sufficiently notified Defendant of the nonconformity per 1302.88.

Accordingly, where the buyer has accepted goods and given notification as required by 1302.88, he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which reasonable. R.C. § 1302.88. The buyer may also recover any incidental and consequential damages under 1302.89. See (incidental damages(direct damages) = ; consequential damages (foreseeable)

Thus, Plaintiff may properly assert a claim for breach of contract against Defendant for delivery of non-conforming goods. Plaintiff may obtain the following damages (1) expectation damages (2) incidental damages (3) consequential damages – damages resulting from shelving comp. cost.

Note: While the Parol Evidence Rule is not per se material at this moment, it will impact this case if it were to proceed to trial. I wanted to note the strength of Plaintiff's case in this regard. Because express written affirmations were made and the same internal dimensions are listed on Defendants website, the court would likely deem any evidence reflecting an alternative dimension as contradictory thereby barring its introduction.

2. Negligence, Product Liability & Supplier Negligence

Generally, the Economic-loss rule prevents recovery in tort for damages for purely economic loss. See, e.g. Corporex Div. & Const. Mgt., Inc. v. Shook, Inc. 106 Ohio St. 3rd 412, 835 N.E. 2d 701 (2005). Determination of whether recovery in tort is available for damage to defective product itself should involve analysis of damage within context of transaction, considering relationship between parties, nature of product's defect, and manner in which damages were sustained, rather than simple labeling of damage as "property damage" or "economic damage." Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Ohio St. 3rd 40, 537 N.E. 2d 624 (1989). Therefore, tort recovery for allegedly non-conforming goods is generally prohibited when Plaintiff suffers only economic harm.

"In negligence, law imposes upon manufacturer of product the duty of reasonable care, and that duty protects consumer from physical injury, whether to person or property, but law of negligence does not extend manufacturer's duty so far as to protect consumer's economic expectations; such protection would arise not under law, but rather solely by agreement between parties." *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St. 3rd 40, 537 N.E. 2d 624 (1989). Thus, in general, if there's no personal injury, the Economic Loss rule restricts recovery to the contractual provisions of the UCC.

Therefore, in this case, it is unlikely that Plaintiff will be able to successfully plead negligence and product liability claims because Plaintiff's harm was purely economic.

3. Violation of Ohio Consumer Sales Practices Act

The Ohio Consumer Sales Practices Act (CSPA) protects individual consumers from unfair, deceptive, and unconscionable sales practices in connection with consumer transactions.

"The Ohio consumer sales practices act is intended to protect consumers outside Ohio as well as those within the state and **applies to deceptive and unconscionable practices directed to non-Ohio consumers also**, and does not impose an undue burden on interstate commerce." *Brown v. Market Development*, Inc. (Ohio Com.Pl. 1974) 41 Ohio Misc. 57, 322 N.E.2d 367, 68 O.O.2d 276, 70 O.O.2d 113.

As used in this section, "actual economic damages" means damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 1345. of the Revised Code and does not include damages for noneconomic loss as defined in section 2315.18 of the Revised Code. R.C.§ 1345.09.

Under R.C. 1345.09, a consumer has a cause of action and is entitled to relief where the violation relates to an unconscionable, deceptive and/or unfair acts and practices in connection with the consumer transaction. The consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages. Actual economic damages include damages for direct, incidental, or consequential pecuniary losses but do not include damages for noneconomic loss per R.C. 235.18. *See also Garber v. STS Concrete Co., L.L.C.,* 991 N.E.2d 1225, 1232 (Ohio Ct.App.2013) ("Actual damages" are defined as "real, substantial, and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury").

In this case, the Plaintiff, as an aggrieved consumer, may properly assert a claim against Defendant for violation of the CSPA. Defendant engaged in deceptive acts that were both false and material to the consumer transaction by providing false information regarding internal dimensions of Plaintiff's caster box.

4. **Breach of Express Warranty**

An express warranty (written or oral) is a seller's affirmation of fact or promise that relates to the goods, the description of the goods, which becomes part of the "basis of the bargain." **In each case, the seller expressly warrants that the goods will conform to the affirmation, promise, or description.**

> "To establish a claim for breach of express warranty under Ohio law, a plaintiff must show that: (1) a warranty existed; (2) the product failed to perform as warranted; (3) plaintiff provided the defendant with reasonable notice of the defect; and (4) plaintiff suffered injury as a result of the defect." *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's, Ents.,* 4th Dist. Ross, 2015-Ohio-4884, 50 N.E.3d 955

Express warranties can be disclaimed (1) if they were never made (evidentiary matter); or (2) by a clear, written disclaimer in the contract with specific unambiguous language called to the buyer's attention. Moreover, a seller's general "AS IS" disclaimer is insufficient to negate the specific, bargained-for attributes of the bargain, provided by the express warranty.

If the buyer has accepted the goods and the goods are defective or non-conforming, the buyer is entitled to monetary damages that equal "the loss resulting in the ordinary course". Accordingly, "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had it they had been as warranted, unless special circumstances show proximate damages of a different amount." R.C. § 1302.88.

In this case**, Plaintiff's claim for breach of express warranty is strong** and may be proved by the corresponding emails as well as the express description found on Defendants websites re

internal dimensions of 7’ x 12’ caster box. Specifically, Defendant made several – written - affirmations of fact, promises, and description that the 7’ x 12’ caster box would contain internal dimensions of 12’ x 6’8 x 6’1. Additionally, the UCC provides that a seller’s general “**AS IS” disclaimer is not enough to negate the specific, bargained-for attributes of the bargain, namely the internal dimensions of Plaintiffs caster box**. Accordingly, the general “as is” disclaimer on the caster box invoice is insufficient to disclaim the express warranty re internal dimensions. Moreover, sufficient and substantive case law supports Plaintiff’s ability to recover for breach of express warranty, thereby entitling Plaintiff to remedies provided under R.C. 1302.88.

5. Breach of Implied Warranties

Warranties are an important part of a sale of goods transaction. Unless properly disclaimed, the UCC imposes warranty obligations on the seller that are implied by the operation of law, custom, or the conduct of the parties, regardless of whether they are included in the written agreement. An implied warranty is not bargained for or stated in the contract. It is implied by law unless it is disclaimed by the seller.

A. Breach of Implied Warranty of Fitness for Particular Purpose

The implied warranty of fitness is based on the specialized needs of the buyer.

The creation of the implied warranty of fitness requires that the seller, when entering into the contract, knows or had reason to know both:
(1) the particular purpose for which the buyer is purchasing the goods; AND
(2) that the buyer is relying on the seller’s skill and judgment to provide suitable goods.

Determining whether the implied warranty of fitness exists is a **question of fact**. The buyer need **not actually inform the seller** of the particular purpose, and such a warranty is not something that is explicitly agreed to or discussed, and in fact, can be given without parties’ knowledge. R.C. § 1302.28. However, **actual reliance** by the buyer on the seller’s expertise is required. *See Delorise Brown, M.D., Inc. v. Allio*, 86 Ohio App. 3d 359, 620 N.E.2d 1020 (1993) (“Implied warranty of fitness for a particular purpose existed where buyer desired to purchase computer system for medical office to improve billing and input data from patient files, buyer communicated such desires to seller, and buyer relied on seller to select an appropriate system.”)

A buyer may maintain an action under law of Ohio for breach of implied warranties after accepting goods as long as he notifies seller of breach within a reasonable time after he discovers or should have discovered breach. R.C. §§ 1302.27, 1302.28, 1302.65(C)(1), 1302.88.

To properly disclaim the implied warranty of fitness, the exclusion must be by a writing and conspicuous. R.C. 1302.29. Per my understanding, general "AS IS" clauses are insufficient to properly disclaim the warranty of fitness, generally.

In this case, the invoice for the caster box states: "Sold as is with factory warranty(s)". As a practical matter, courts will look at whether the reduction or elimination of warranties was part of a valid/legitimate allocation of risks within the negotiation of the contract. However, the validity and impact of the allocation of risk inherent with proper disclaimer does not permit a seller to provide buyer a product inconsistent with the terms of the agreement.

Bottom line, the internal dimensions of the caster box were expressly represented by Defendant both via email and on its website to be 12' x 6'8" x 6'1". Regardless of the presence of the as is clause, Plaintiff may properly assert breach of implied warranty of fitness because the caster box deviated from the express internal dimensions.

B. Breach of Implied Warranty of Merchantability

The implied warranty of merchantability **arises automatically** in a contract for the sale of goods **if the seller is a merchant with respect to goods of that kind**. R.C. 1302.27(A). A seller is a merchant if it is engaged in the business of selling the types of goods being sold under the agreement. Generally, this means that the goods purchased are not defective and fit for the ordinary purposes for which they are used. Per R.C. § 1302.27, "**in an action based on breach of warranty**, it **is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.**"

Under 1302.27, a merchant makes the implied warranty – unless properly disclaimed – that the goods it sells are merchantable. To be merchantable, "the goods must at least…

(1) Pass without objection in the trade under the contract descriptions; and
(2) For fungible goods, be of fair average quality within the description; and
(3) Be fit for the ordinary purposes for which they are used; and
(4) Run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unite and among all units involved; and
(5) Are adequately contained, packaged, and labeled as the agreement may require; and
(6) Conform to the promises or affirmations of fact made on the container or label if any."

In this case, Plaintiff may properly assert a claim for breach of implied warranty of merchantability. However, this claim is not as strong as the breach of express warranty

and implied warranty of fitness. While the goods provided to Plaintiff deviated from the represented internal dimensions, they were not entirely unfit for the ordinary purposes for which they are used. **BUT**, sufficient caselaw exists to support a claim for breach. Additionally, there is a possible argument based on the received condition of the caster box and the failure to conform to the promises/affirmations of fact made on the label/container, as the case law in this area is limited and somewhat resembles the facts of this case.

6. Negligent & Fraudulent Misrepresentation

Unless displaced by particular provisions of the UCC itself, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, **fraud, misrepresentation**, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, **supplement the Code provisions**.

Thus, because the remedies for fraud provided by the UCC are **not exclusive**, **a plaintiff bringing a common-law cause of action for fraud** in a commercial setting is not limited by the UCC provisions governing warranties, warranty disclaimers, and limitation of remedies but **is entitled to seek all damages incurred as a result of the fraud**.[1]

Importantly, the UCC imposes the obligation of good faith in the performance or enforcement of every contract or duty within the scope of the UCC, and, with respect to merchants, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

A. Negligent Misrepresentation

"Negligent misrepresentation" is defined as follows: " '[One] who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, *supplies false information* for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'" *Leal v. Holtvogt*, 123 Ohio App. 3d 51, 62, 702 N.E.2d 1246, 1253 (1998)

In this case, the Plaintiff may properly assert a claim for negligent misrepresentation because the Defendant communicated false information to the Plaintiff regarding the internal dimensions of the caster box, failed to use reasonable care/competence in obtaining/communicating the information, Plaintiff justifiably relief on the information, and Plaintiff's injuries were a proximate cause of such reliance.

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[1] 81 Ohio Jur. 3d Sales and Exchanges of Personal Property § 234

B. Fraudulent Misrepresentation

The elements of a cause of action for fraudulent misrepresentation or concealment are (1) a material false misrepresentation or a concealment, (2) knowingly made or concealed, (3) with intent of misleading another into relying on it, (4) reliance, with a right to rely, on the misrepresentation or concealment, and (5) injury resulting from the reliance. *Donnelly v. Taylor*, 2002-Ohio-7461, 122 Ohio Misc. 2d 24, 786 N.E.2d 119, aff'd, 2003-Ohio-729.

In this case, the Plaintiff may properly assert a claim for fraudulent misrepresentation because Defendant affirmatively represented the internal dimensions of the caster box to be 12' long x 6'8" wide x 6'1" tall. Defendant had knowledge that the represented internal dimensions were false and material to the transaction. Defendant made the misrepresentation with intent to mislead Plaintiff into relying on it. Plaintiff justifiably relied on Defendant's representation. Plaintiff's reliance on Defendant's representation proximately caused Plaintiff's injury.